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Homicide in Defense of Property

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grantee. The grantor by reserving the life estate in himself necessarily recognizes the grantee as the owner of the property subject to the life estate. This construction of the deed is further borne out in the principal case by other clauses providing that the deed was to become void if the wife abandoned her husband or died before he did.

In the principal case the grantor, by placing the conditions in the deed, did not make a present grant in fee simple subject to the life estate. It was a present grant of a fee simple conditional, subject to being defeated by the happening of those conditions and this effect was apparently the grantor's intention.

KENNETH A. HOWE.

HOMICIDE IN DEFENSE OF PROPERTY.—The laws of all civilized countries have recognized, as an incident to the right to acquire and own property, that the owner has the right to defend and protect his property against any aggressor and if he commits an assault in so doing the law will justify him.

Such force may be used by a person as may appear to him to be reasonably necessary, in the defense of his personal or real property, or to prevent another from taking the possession away from him, but this defense must not be carried so far as the killing of the aggressor for the mere protection of his property, unless he is in possession and the killing would be necessary to prevent the commission of a felony. A homicide will not be justified by the mere fact that the property is being wrongfully taken or detained. *Chapman v. Commonwealth*, 12 K. L. R. 704, 15 S. W. 50 (1891), *Trusty v. Commonwealth*, 12 K. L. R. 706, 41 S. W. 766 (1897), *Stacy v. Commonwealth*, 189 Ky 402, 225 S. W. 37 (1920), *State v. Johnson*, 12 Ala. 840 (1848). The underlying principle behind this line of decisions is that the preservation of human life is more important to society than the preservation or protection of property. The law may afford ample compensation for the loss of property, but utterly fails to do so for the loss of a human life. *Story v. State*, 71 Ala. 329 (1882).

If the trespass upon the person or property of another amounts to a felony, the killing of the trespasser will be justifiable homicide if it was necessary in order to prevent the commission of a felony. A killing will not be justified by a trespass that amounts only to a misdemeanor. *Crawford v. State*, 112 Ala. 1, 21 So. 214 (1895). A trespasser may be prevented from carrying away property by the use of no more force than is actually necessary for that purpose, this degree of force cannot be carried to the extent of inflicting great bodily harm or the taking of life. The owner will only be justified in the use of sufficient force to prevent the trespass, destruction, or the carrying away of his property. The retention of property will not be allowed when it is necessary to sacrifice human life in order to retain the possession of the property. If the owner of the property is assaulted by the wrong-doer, where the owner is attempting to prevent the trespass or taking of his property, the owner may wound or kill, if necessary, in

the defense of his person. *Grigsby v. Commonwealth*, 151 Ky. 496, 152 S. W. 580 (1913). *Chapman v. Commonwealth*, 12 K. L. R. 704, 15 S. W. 50 (1891). If the parties are involved in a difficulty over property, one has no right to kill the other when he is not in danger of death or the infliction of some great bodily harm. *Chapman v. Commonwealth*, 12 K. L. R. 704, 15 S. W. 50 (1891), *Trusty v. Commonwealth*, 12 K. L. R. 706, 41 S. W. 766 (1897).

If a person by the employment of the necessary force, and no more, accidentally kills a person in the resistance of a trespass to property, the homicide is not punishable. A person in the defense of his property, to prevent a mere trespass, should not use means reasonably calculated to endanger life. If a deadly weapon is used in a trespass upon property, and death results, however, unintended, or if the trespasser be deliberately killed, whether the trespass could or could not have been otherwise prevented, the killing in either case is murder. Bishop *Crim. Law*, 7 Ed., Secs. 61, 62 *Harrison v. State*, 24 Ala. 67 (1854).

A mere trespass upon property cannot be prevented by the taking of life, yet a person in the defense of his property, and resistance of a forcible trespass, has the legal right to prevent the commission of a felony, and in this defense he may use whatever force that may be necessary, even to the extent of taking the life of the felonious aggressor, and the law under such circumstances will justify the homicide. *People v. Payne*, 8 Cal. 341 (1857), *People v. Dan*, 53 Mich. 490 (1884). Ordinarily the killing that is allowed in the defense of property is solely for the prevention of a felony. *State v. Clark*, 51 W. Va. 457 (1902). Under certain circumstances the right to kill may exist after the commission of a felony. In defending against a robbery the right to kill does not end as soon as the property has technically passed into the possession of the felonious aggressor, but this right to kill remains with the owner as long as the property is in his immediate presence, and the killing of the robber will prevent it from being carried away. It is not necessary that the taking of property by a robber shall be from one's person; it is sufficient if it be taken from his possession and immediate presence. *Flynn v. Commonwealth*, 204 Ky. 572, 264 S. W. 1111 (1924).

The general doctrine as to the defense of property is not applicable to the defense of habitation. A man is not bound to retreat from his own home, but may stand his ground, and in the prevention of an unlawful or forcible entry of any person he may use such force, as may be necessary, even to the taking of life. *Sparks v. Commonwealth*, 89 Ky. 644 (1890), *Commonwealth v. Wright*, 85 Ky. 123 (1887), *Saylor v. Commonwealth*, 97 Ky. 184 (1895).

The law governing the conditions under which a homicide may be justifiable in defense of property appears to have been clearly stated by the Kentucky court thus: "A person is not bound to retreat when upon his own premises, but may stand his ground and defend his person or property; but he is not justified to take the life of a mere trespasser, or to do him bodily harm to prevent the mere trespass. But

if the trespass is committed with the intention of killing or doing the owner of the property great bodily harm, if he resists the trespass, in such case the trespass is committed with felonious intention against the owner, and he has the right to stand his ground and kill the felonious trespasser if he has reasonable ground to believe that it is necessary to protect his life or to prevent great bodily harm at the hands of the trespasser." *Baker v. Commonwealth*, 94 Ky. 305, 306 (1892).

The defenses applicable to the defense of property are not applicable as a defense to a homicide as a result of a controversy over land. The rights of the parties in such a controversy are subjects which should be litigated in the courts of civil jurisdiction. The guilt or innocence of the defendant, upon the criminal charge, does not depend upon whether he was right or wrong in the controversy relative to the land. Neither party can, by a breach of the peace, legally vindicate his rights whatever he conceives them to be, much less by going to the extreme of taking a human life. Neither party will be allowed to resort to the use of firearms or kill, except in the usual manner of self-defense. *Utterback v. Commonwealth*, 105 Ky. 723 (1899), *Commonwealth v. Bullock*, 24 K. L. R. 78, 67 S. W. 992 (1902).

To what extent may a person protect his property in an indirect manner, such as the setting of springguns, traps, etc.? The general rule appears to be that a person may not do indirectly, the things that he may not do directly. A man would not be justified in defending his property by the use of instruments of destruction, where he would not be justified in taking life if his house or property was actually assailed by a person with a felonious intent. Wharton, *Crim. Law*, Sec. 570. *Gray v. Combs*, 7 J. J. Mar. 479 (1832).

C. F. PACE.

DIVORCE—POWER OF THE COURT OF APPEALS TO REVERSE JUDGMENT OF DIVORCE.—In the recent case of *Autry v. Autry*, 237 Ky. 608, 36 S. W. (2d) 15 (1931), the husband sued his wife for divorce on the ground that she had been guilty of such lewd and lascivious conduct as proved her to be unchaste. The wife denied the allegation of the petition, and counterclaimed for divorce on several grounds, including cruel and inhuman treatment. The chancellor granted the husband a divorce, and the wife appealed. The court held that, "although we are without power to reverse a judgment of divorce, yet we may consider the evidence for the purpose of determining whether alimony was properly denied or the custody of children was properly granted."

The prevailing rule in Kentucky, and in some other jurisdictions, is that no appeal lies from a judgment or order granting a divorce. *Chaudet v. Chaudet*, 231 Ky. 477, 21 S. W. (2d) 812 (1929).

In this country there is no tribunal having the jurisdiction of the ecclesiastical courts. When the colonies and the states of the union adopted the common law of England they did not adopt the ecclesiastical law pertaining to marriage and divorce. *Ackerman v. Ackerman*,